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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 87

WALTER K. WARREN,

Petitioner,

—against—

UNITED STATES OF AMERICA, as owner of the Steamship "ANNA HOWARD SHAW", *et al.*,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

SAUL SPERLING
and
CHARLES A. ELLIS,
Proctors for Petitioner

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UNITED STATES OF AMERICA, as owner of the Steamship "ANNA HOWARD SHAW", *et al.*,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

Opinions Below

The two opinions delivered in the District Court for the Southern District of New York (R. 97-109, 115-116) are published at 75 F. Supp. 210 and 76 F. Supp. 735. The three opinions delivered in the Court of Appeals for the Second Circuit (R. 137-141, 154-157) are published at 179 F. 2d 919-924.

The Writ and Jurisdiction

This Court granted a writ of certiorari herein October 9, 1950 (R. 158). The first decision of the Court of Appeals was rendered December 27, 1949 (R. 142). Peti-

tioner made timely application for rehearing (R. 143-153), on which a majority opinion and order denying the application and a dissenting opinion were rendered March 2, 1950 (R. 154-158); and judgment was entered on the remittitur March 16, 1950 (the date mentioned in the Petition, p. 4). The Petition was filed May 24, 1950. The jurisdiction of this Court is found in 28 U. S. Code, Sections 1254(1) and 2101(c).

Summary Statement of Matter Involved

Petitioner, an American seaman, filed a libel in United States District Court for the Southern District of New York March 2, 1945 (R. 1, 3-6), against the United States, as owner, and American South African Line, Inc., as operator, of the S.S. ANNA HOWARD SHAW, in which maintenance and cure was claimed. Both respondents pleaded in defense petitioner's alleged gross negligence (R. 9, 14). The case was tried October 29 and 30, 1947, before District Judge Medina (R. 31-90). After conclusion of the trial the Court awarded $644.16 maintenance and cure and $36 costs against American South African Line, Inc., but dismissed as to the United States for alleged improper venue. American South African Line, Inc., appealed to the Court of Appeals, Second Circuit, and Petitioner cross appealed from dismissal as to the United States. Pending said appeals this Court decided *Fink* v. *Shepard S.S. Co.*, 337 U. S. 810, holding that under an operating contract such as involved here only the United States could be held liable. Petitioner thereupon stipulated for reversal as to American South African Line, Inc., but argued the appeal from dismissal as to the United States, claiming, under the circumstances, and under the record and findings, to which throughout the United States was party, the award made against South African Line,

Inc., should be made against the United States under *Fink* v. *Shepard S. S. Co., supra.* The Court of Appeals (L. Hand, *C.J.*, Swan and Frank, *Js.*) held that the District Court erred in dismissing as to venue; but affirmed "on the merits" the dismissal as to the United States. In Petitioner's application for rehearing Petitioner stressed both the Court's error in failing to apply to the case the Shipowner's Liability (Sick and Injured Seaman) Convention, 1936 (54 Stat. 1693-1704), and its error under general maritime law—if the Convention were not applied—in holding Petitioner guilty of gross negligence and that such was a bar to maintenance and cure. The motion was decided apparently only as to the Convention, and a majority (Swan, *J.*, concurred in by L. Hand, *C.J.*) held that the Convention did not warrant changing their decision, with Frank, *J.*, dissenting on the ground that the liability provisions were self-operating, while the provisos permitting that national laws or regulations "may make exceptions" were inoperative to create exceptions in absence of legislation.

Material Facts

Respondents offered no evidence with respect to the happening of the accident and rested at the close of petitioner's case.

Petitioner was a messman in the steward's department of the S.S. ANNA HOWARD SHAW, on his first trip overseas, and had signed articles and joined the ship June 1, 1944 (R. 32). On October 30, 1944 the ship was in port near Naples, Italy, and petitioner went ashore on shore leave pass issued by the Captain (R. 33). Three men, the ship's carpenter, another messman and petitioner, walked about sightseeing for a time and then went into a dance hall, comparable to U. S. O. clubs, where American soldiers

were entertained (R. 34-35, 65-66), five or six American soldiers being inside (R. 66), and outside which were a jeep and two American M. Ps., to whom he talked casually (R. 40, 65-66). People other than the Americans inside were well dressed and included one Italian woman schoolteacher who spoke English, and with whom he talked (R. 65), and a few others who could talk English (R. 81).

Petitioner enjoyed nature and scenery (R. 37). From one of the rooms large French doors were open onto a platform or ledge some three feet wide (R. 38, 68) and three or four sets of doors in length (R. 87), facing the sea and affording a beautiful view toward the Isle of Capri, and of the water hitting the stone below the platform and spraying (R. 66, 67, 37-8). He observed other people go over and onto the ledge and out to the edge and look, and so did he (R. 67, 88). He stood a few seconds, perhaps three to five minutes, before falling when a rod which he grasped gave way, and so surprised him that he lost his balance and fell (R. 68, 38). The rod did not extend to the floor, but appeared to be a hand-hold to hold on to (R. 70). He was thinking about the scenery out across the bay (R. 88, 68, 204). He "somehow or other" took hold of the rod, and as he did so and looked out a bit to see better the view, the rod let loose; surprised, he did not have time to recover himself, and fell below to his injury (R. 38-39).

He sustained a fracture of the distal end of the right tibia and fibula resulting in an osteomyelitis, which required the performing of an open reduction and which hospitalized him from October 30, 1944 to November 17, 1944 (R. 40) and from December 8, 1944 to December 21, 1944 (R. 43) and from February 27, 1945 to May 28, 1945 (R. 48) and which disabled him to July 1, 1945 (R. 55). His expenses were proven as basis for the award (R. 43, 46-47, 48, 49, 51, 54, 55).

Assignments of Error

The Court of Appeals, Second Circuit, erred

1. In holding that the decision of this maintenance and cure case is not affected by the terms of the Convention.

2. In holding that "shall be liable" provisions and "may make exceptions" provisions of the Convention are equally inoperative or equally self-operative, without legislation.

3. In not holding that clauses 1 of Articles 2 and 4 of the Convention are self-operative, and clause 2 of Article 2 inoperative, without legislation or regulations thereunder.

4. In not holding that Petitioner is entitled to maintenance and cure, under Clause 1 of Article 2 of the Convention, because his injury occurred "between the date specified in the articles of agreement for reporting for duty and the termination of the engagement."

5. In holding that negligence of Petitioner barred his claim for maintenance and cure.

6. In holding that Petitioner was guilty of "gross negligence" which barred his claim for maintenance and cure.

7. In holding that a seaman's right to maintenance and cure depends upon his "degree of care" or "degree of negligence."

8. In applying in a maintenance and cure case an unrelated States statutory concept of "degrees of negligence."

9. In failing to hold that (i) the words "wilful act, default or misbehavior" in Clause 2 (b) of Article 2 of the

Convention, and (ii) the general maritime law, do not allow as a defense to maintenance and cure "gross negligence" as interpreted by the Court of Appeals.

10. In holding that Petitioner is not entitled to maintenance and cure because to allow it would make the ship an insurer of his safety.

The Convention (Treaty) Provisions Involved

The treaty involved is the Shipowners Liability (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693-1704. The specific provisions to be construed and applied are the provisions of Clauses 1 and 2 of Article 2, and Clauses 1, 2 and 3 of Article 4, as follows:

"ARTICE 2.

"1. The shipowner shall be liable in respect of—

(a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;

(b) death resulting from such sickness or injury.

"2. Provided that national laws or regulations may make exceptions in respect of:

(a) injury incurred otherwise than in the service of the ship;

(b) injury or sickness due to the wilful act, default or misbehavior of the sick, injured or deceased person;

(c) sickness or infirmity intentionally concealed when the engagement is entered into.

"ARTICLE 4

"1. The shipowner shall be liable to defray the expenses of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character.

"2. Provided that national laws or regulations may limit the liability * * * to a period * * * not * * * less than sixteen weeks * * *.

"3. Provided also that, if there is in force in the territory in which the vessel is registered a scheme applying to seamen of compulsory sickness insurance, compulsory accident insurance or workmen's compensation for accidents, national laws or regulations may provide:

(a) that a shipowner shall cease to be liable * * * from the time at which that person becomes entitled to medical benefits under the * * * scheme;

(b) that the shipowner shall cease to be liable from the time prescribed by law for the grant of medical benefits under the * * * schemes, even when * * * not covered by the scheme in question, unless he is excluded from the scheme by * * * restriction which affects particularly foreign workers * * *."

Summary of Argument

Manifesty, either (1) the liability clauses are self-executing and the provisos permitting national laws to "make exceptions" are not, but leave "exceptions" to be made by legislation; or (2) both the liability clauses and the clauses permitting exceptions are self-executing; or (3) neither are self-executing, the Convention is without effect and the case governed by pre-Convention general maritime law.

The decision below toys with all but decides none of the three. It alternately assumes or verbally expresses (2) and (3) and verbally denies (1); but in reality resorts to (1) by employing an assumed *judicial* power to "make exceptions" which Congress deliberately refused or omitted to make.

It defines "national laws or regulations" to include "decisional law," and appears to define the latter as including pre-Convention "decisional law." But in both it ignores the words "may make exceptions." The notion that pre-Convention decisional law may make exceptions involves the paradox of pre-Convention Judges carving exceptions out of treaty provisions more than fifty years before the treaty itself was made. The result that the March 2, 1950 decision itself makes the exceptions involves the paradox that one Court of Appeals can "make" exceptions which for eleven years Congress and other Courts have not made.

The majority decision treats the Convention as a riddle, whose meaning is to be sought by guess or speculation, forgetting that treaties are the subject of careful consideration and are made by experts "competent to express their meaning and to choose apt words in which to embody the purpose of the high contracting parties" (*Rocca* v. *Thompson*, 223 U. S. 317, 332).

We submit that in this most carefully drawn Convention, whose language is masterfully simple and plain, the liability provisions are statute-like and as positive and effective as a statute could have made or now could make them: but that the provisions permitting that national laws "may make exceptions"—even as the provision permitting that any nation "may denounce" the treaty at ten year intervals—are contractual provisions, completely executory and subject to legislative discretion to make or omit to make exceptions within the field marked out. They involve important competitive national policy, equally present in either the making or omitting to make exceptions. Congress has omitted to make any exceptions and the liability provisions control *sans* exceptions.

If, nevertheless, the clauses permitting exceptions either were self-executing or permitted Courts to determine the national policy and "make" the exceptions permitted, the exception clause relied on is confined to "wilful" wrongs of the injured man and permits no defense based on negligence. Petitioner was guilty only of negligence.

If, moreover, the treaty were wholly ineffective, the general maritime law would control: and it allows no defense based on negligence, whether with or without the epithet "gross".

We submit also that the Court should clarify the error of the Court below in employing against rather than in Petitioner's favor the shipowners' shibboleth that liability involves insurance.

POINT I

The liability provisions are positive, self-implemented and self-operative, creating enforceable liabilities as positively as would like provisions of a statute, and supersede pre-convention decisional law.

1. The liability provisions of the Convention are self-implementing and complete, and prescribe in positive form, within the Convention, every element of liability.

They include comprehensive, plain and positive provisions that "This Convention applies" to all persons employed on board any vessel, other than a ship of war (Art. 1, Cl. 1); that "The shipowner shall be liable in respect of * * * injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement" (Art. 2, Cl. 1); and five clauses fully and positively implementing such general liability with four specific liabilities, covering: medical care and maintenance (Art. 3 and Art. 4, Cl. 1); wages (Art. 5, Cl. 1); expense of repatriation (Art. 6); and burial expenses (Art. 7, Cl. 1). The Convention provides in each case that "The shipowner *shall be liable*" to defray or pay the same. (Compare as to the fifth subject of liability Art. 8, which provides that "National laws or regulations shall require" the shipowner to safeguard property).

2. These liability provisions are as fully self-implemented and complete as those in Part IV of the British *Merchant Shipping Act, 1906*, L. R. 6 & 7 Edw. Ch. 48, Part IV, §§28-49, pp. 257-270.* They are implemented, moreover, with as

* The English statute deals, in different order, with substantially the same liability subjects as the Convention, viz., wages and effects of a seaman left behind (Sections 28, 37-39); property of a seaman dying (Section 29);

fully defined liabilities as ever recognized or provided by the general maritime law, as heretofore enforced in our Courts, or by the ancient codes out of which the general maritime law developed.

3. The provision in Art. 2, Cl. 1 for liability in respect of "injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement" was intentionally and carefully devised and adopted, with the specific object of having it embrace all injuries whatsoever, howsoever and wheresoever occurring within this "period of protection". (See discussion of "The period of protection" and "Risks Covered" in *First Discussion* report, *International Labour Conference*, 13th Sess., Geneva, 1929, *"The Protection of Seamen"* etc., *Second Item on the Agenda*, pp. 34, 209, 239; Record of Proceedings, *International Labour Conference*, 13th Sess., Geneva, 1929, p. 362; *Questionnaire II, International Labour Conference*, 13th Sess., *"The Protection of Seamen"* etc., *Second Item on the Agenda*, pp. 12, 26, 64; *Second Discussion—Report II, International Labour Conference, "The Protection of Seamen"* etc., *Second Item on the Agenda*, Geneva, 1931, pp. 29, 120, 161; *Record of Proceedings, International Labour Conference*, 21st and 22nd Sess., Geneva, 1936, p. 250; and discussion of the implementing provisions (Art. 4, Cl. 1; Art. 5, Cl. 1; Arts. 6, 7) collectively as providing the "Benefits," or "Benefits, and ship-

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repatriation (Sections 32, 45-47); maintenance and cure, repatriation, burial, temporary removal (Sections 34-35); maintenance of distressed seamen (Sections 40-42, 48). The provisions of Sections 34-35 are most nearly analogous to the Convention provisions here involved. Each provision deals, like the Convention, with the shipowner's liability to defray the expense involved, with no attempt to fix arbitrary amounts, nor arbitrary minimum or maximum limits. The English Act, however, specifically makes certain exceptions, in contrast to providing that national laws or regulations "may make" exceptions "in respect of" stated subject matters.

owner's liability" in *First Discussion* report, *supra*, pp. 47-85, 211-220; *Record of Proceedings*, 18th Sess., *supra*, pp. 363-370; *Questionnaire*, *supra*, pp. 14-23, 27, 64-67; *Second Discussion—Report II*, *supra*, pp. 44-49, 129-153.)

The *First Discussion* report, *International Labour Conference*, 13th Sess., 1929, *supra*, discussed the varying past national definitions of the limits of the period of protection (*Id.*, pp. 34-37); the risks covered and their relationship to the service (*Id.*, pp. 41-45), and pointed out that "The extent of shipowners' obligations toward seamen may differ considerably according as they cover *all* injuries and all illness *occurring during the period of protection*, or, on the contrary, as their obligation is confined to injuries and illnesses resulting from the service of the ship" (*Id.*, p. 37; italics ours).

Respecting "the seaman ashore on authorized leave", it stated that "account must be taken of the facts that it is in virtue of his agreement that a seaman undertakes a voyage, that he goes ashore on leave in various ports, * * * and that even certain faults and excesses may be explained, if not excused, by the constraint resulting from life on board ship" (*Id.*, p. 40).

Respecting the notion of fault it noted that, as to seamen, as yet, "There are few laws which do not introduce the notion of fault", but suggested "that it seems that the rights of the seamen should not be subject to any restriction" (*Id.*, p. 42).

In its Conclusion it stated: "Although it is a nice task to choose the appropriate terms, it may be suggested that the international regulations *should lay down that the period of protection should be such as to cover all sickness, injury, death occurring from the time of entry into service*

until the time of leaving the ship at the port of engagement * * *" (*Id.*, p. 210; italics ours).*

The Convention represents the ultimate adoption of this view, with a compromise of adding separated clauses containing provisos agreeing that each nation acting unilaterally might make limited exceptions.

4. The liability provisions, moreover, are as positive and plain as any statute could make them. The words of Art. 1, Cl. 1 that "This Convention applies" are equally or more positive than the words "shall apply" used throughout our "Shipping" Code, 46 U. S. C. §§161, 188, 526q, 544, 570, 593, 597, 598, 599(e), 601, 688, 690, 709, 803, 845b, 1119b, 1128d, 1155a (a), 1312, 1314.

The specification in Art. 1, Cl. 1, of the persons to whom the Convention "applies," as "all persons employed on board any vessel, other than a ship of war * * * and ordinarily engaged in maritime navigation" conforms to the definition of "seaman" repeatedly found in our statutes, *i.e.*, "Shipping," 46 U. S. C. §713; "Aliens and Nationality," 8 U. S. C. §173; "Public Health and Welfare," 42 U. S. C. §201; "Emergency and War Shipping Acts," 50 App. (U. S. C.) §1291. Indeed, in the proceedings relating to

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* Note that Respondent's plaint in its Brief in opposition to the Petition (p. 3, footnote 2) that "in most cases" the shipowner has available only such evidence as he can wring from the seaman, itself refutes the lower Court's argument that literal interpretation of the Convention "would benefit only seamen who are least deserving of protection" (179 F. 2d 923). The very plaint voiced claims an inability, and shows an indisposition, to distinguish between "deserving" and undeserving; the course followed being instead to treat all as suspect, and all to be contested and even litigated. The Convention, in simply reversing this to have none contested, benefits most of all the suffering thousands with honest claims, but who the claim adjuster insists he has no reason to believe are different from the "least deserving." Contrary to the spirit of Art. 9 "for securing the rapid and inexpensive settlement of disputes," the shipowner rather would have the privilege of contesting, whether with or without cause, every claim presented, until the highest Court determine each case of liability.

drafting of this Convention, the definition in 46 U. S. C. §713 was referred to in *First Discussion* report, *International Labour Conference*, 13th Sess., *supra*, at page 18. Compare also *Tucker* v. *Alexandroff*, 183 U. S. 424, 444; *The Ida G. Farren*, D. C. E. D. N. C., 127 Fed. 766; *Weaver* v. *Pittsburgh Steamship Co.*, C. C. A. 6, 153 F. 2d 597, 600, cert. denied 328 U. S. 858. Just as in the statutes and decisions cited, the Convention employs a purely contractual relationship designation; and its provision that the Convention "applies" to those designated leaves nothing to be added by legislation.

5. The words "shall be liable" used in Clauses 1 of Arts. 2, 4, 5, 6 and 7 are precisely the same words, used with precisely the same meaning and effect, in *Lord Campbell's Act* of August 26, 1846, L. R. 9 & 10 Victoria Ch. 93, §1, p. 531; in the *Act of March 30, 1852*, §30, 10 Stat. 72 and *Act of February 28, 1871*, c. 100, §43, 16 Stat. 453, formerly R. S. §4493 and now 46 U. S. C. §491, covering "Liability of master and owners for damage to passengers," interpreted in *Sherlock* v. *Alling*, 93 U. S. 99, 105-106; and in the *Federal Employers Liability Act* of April 22, 1908, Ch. 149, §§1 and 2, 35 Stat. 65, now 45 U. S. C. §§51, 52 which is the principal statute incorporated by the words "shall apply" in §33 of the *Jones Act* of June 5, 1920, c. 250, §33, 41 Stat. 1007, now 46 U. S. C. §688.

They are the same words "shall be liable" used also in 46 U. S. C. §183, par. (d), and throughout the Shipping Code, 46 U. S. C. §§22, 23, 30, 32, 37, 38, 40, 46, 60, 62, 85g, 88g, 91, 101, 103, 142, 152, 153, 155, 156, 158, 159, 170(16), 175, 181, 182, 186, 194, 203, 222, 224, 224a, 229b, 265, 267,

277, 278, 287, 288, 295, 297, 299, 301, 304, 309, 312, 315, 316, 319, 321, 322, 323, 324, 334, 352, 355, 402, 436, 452, 457, 461, 465, 466, 492, 495, 497, 526o, 532.

They are used also in the *Longshoremen's and Harbor Workers Compensation Act* of March 4, 1927, c. 509, §4, 44 Stat. 1426, 33 U. S. C. §904; in the New York *Workmen's Compensation Law*, 64 McKinney's Consolidated Laws, Part 1, §10, as amended by L. 1947, c. 794, §6; in the British *Workmen's Compensation Act, 1906*, L. R. 6 & 7 Edw. c. 58, §§1 and 4, pp. 326 and 329, and in *Workmen's Compensation Act, 1925*, L. R. 15 & 16 Geo. 5, 1925, Stat. c. 84, pp. 1622, 1623, 1626.

Respecting Section 16 (b) of the *Fair Labor Standards Act* of June 25, 1938, c. 676, 52 Stat. 1069, 29 U. S. C. §216(b), where the same words "shall be liable" are used, and where the word "wilful" used in (a) did not appear in (b), this Court in *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, 581-582, affg. *Missel* v. *Overnight Motor Transportation Co.*, C. C. A. 4, 126 F. 2d 98, 110-111, approved a holding that the provision "was mandatory on the Courts" (316 U. S. 581).

6. Similarly worded, though less positive, provisions of treaties have been held self operative. In *Geoffrey* v. *Riggs*, 133 U. S. 258, this Court held to be self-executing treaty provisions that citizens of each country "shall be at liberty to dispose" of property; "shall be able to succeed" to property (Treaty of 1800), and "shall be free to dispose" of property (Treaty of 1853). In *Santovincenzo* v. *Egan*, 284 U. S. 30, 35-36, this Court held to be self-executing treaty provisions that in case of death of a citizen of one country in the other country his effects "shall be delivered up" to the Consul or Agent.

The provisions of the Warsaw Convention have been held self-executing, *Garcia* v. *Pan American Airways*, 269

App. Div. (N. Y.) 287, affg. 183 Misc. 258, and affd. 295 N. Y. 852, motion denied 295 N. Y. 981, cert denied 329 U. S. 741; *Wyman* v. *Pan American Airways*, 181 Misc. 963, affd. 267 App. Div. 947, appeal denied 267 App. Div. 983, affd. 293 N. Y. 878 cert. denied 324 U. S. 882; *Indemnity Insurance Co. of North America* v. *Pan American Airways*, D. C. S. D. N. Y., 58 F. Supp. 338. In the *Garcia* case the Appellate Division cited this Court's decision in *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 41, 42, which involved the Convention here involved.

Even the Court below, with Judges L. Hand, Swan and Chase sitting, and Judge Swan writing the opinion, held in *Warschauer* v. *Lloyd Sabaudo S. A.*, CCA 2, 71 F. 2d 146, 148, cert. denied 293 U. S. 610, that a treaty provision that "The owner of the vessel incurs no liability" was a declaration which "needs no 'implementation' by legislation" and was binding on the Court.

7. In short, the Convention here involved uses, throughout the liability provisions, statute-like language, to which, under our Constitutional system, nothing need be added to make it enforceable. For, whereas in some countries, for example, England, treaties normally are merely a Crown contract and not considered law of the land unless enacted into law by Act of Parliament (*United States* v. *Rauscher*, 119 U. S. 407, 417), so that "the consent of the authority or authorities within whose competence the matter lies" required by International Labor Organization Constitution Arts. 19, 20, might include Parliament; a treaty here, once ratified by and with the advice and consent of the Senate (United States Constitution, Art. II, Sec. 2, Cl. 2), is "the supreme law of the land" (*Id.*, Art. VI, Cl. 2; *United States* v. *Rauscher*, *supra*, 119 U. S. pp. 417-419). Hence, the registration on October 29, 1938, of our national ratification complied fully with the pro-

visions of the International Labor Organization Constitution, with the Convention, and with our national Constitution, and made the Convention operative, according to its terms, from one year later, October 29, 1939, as law of the land (See President's *Proclamation*, 54 Stat. Pt. 2, p. 1704; *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 42). The Court, accordingly, should resort to its provisions for the rule of decision "as it would to a statute" (*Head Money Cases*, 112 U. S. 580, 598-599; *United States* v. *Rauscher*, *supra*, 119 U. S. at 418-419).

8. The statute-like, codifying character of the liability provisions is confirmed by the final language of Article 9 concerning "settlement of disputes concerning the liability of the shipowner *under this Convention*"; Article 11 concerning interpretation of laws or regulations relating to "benefits *under this Convention*"; and savings clause Article 12 saving only any law, award, custom or agreement "which ensures more favourable conditions than those provided *by this Convention*". (Italics ours). The very purpose of adding Article 12, over the objection that it was unnecessary, was to complete it as a self-sufficient code (See discussion, *Record of Proceedings, International Labour Conference, 21st and 22nd Sess.*, 1936, pp. 82-83).

Moreover, the last vestige of any language of the proposed liability provisions having any contractual or executory, as distinct from statute-like quality, was removed when the originally proposed Article 1 (*Id.*, p. 244) was eliminated (*Id.*, p. 248), and then the liability provisions themselves were revised to the "shall be liable" form, and Articles 9 and 11 revised and Article 12 added as above noted.

9. Had these same liability provisions been made by national codifying statute, instead of by codifying treaty,

there could be no question of their stature, as complete in themselves, so as to supersede prior law on the subject (Cf. *Murdock* v. *City of Memphis*, 20 Wall [87 U. S.] 590, 617; *United States* v. *Tynen*, 11 Wall [78 U. S.] 88, 92; *District of Columbia* v. *Hutton*, 143 U. S. 18, 27; *Hamilton* v. *Rathbone*, 175 U. S. 414, 421). Prior to the Convention we had no statutory laws covering the same subject; and the treaty-making power, by the Convention, "took possession of the field" of shipowners' liability to seamen on the subjects covered, just as effectively as the Employers Liability Act "took possession of the field" of railway liabilities, with pre-Convention law equally "superceded" (Cf. *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, 501).

10. Had they been adopted as Uniform Laws, by legislative acts of the different countries, there could be no question that the very purpose of uniformity would require that we look to them, rather than to pre-Convention concepts in any one State, for the rule of decision. (Cf. *Commercial National Bank of New Orleans* v. *Canal-Louisiana Bank & Trust Co.*, 239 U. S. 520, 528-529; *Interstate Banking & Trust Co.* v. *Brown*, CCA 6, 235 Fed. 32, 36, cert. denied 242 U. S. 632; *Giles* v. *Vette*, 263 U. S. 553, 564, affg. *In re Marcuse & Co.*, CCA 7, 281 Fed. 928, 940; *Austin Nichols & Co.* v. *Gross*, 98 Conn. 782; *Harris* v. *Esterbrook*, 55 S. D. 538, 70 A. L. R. 241; *Fidelity & Casualty Co. of N. Y.* v. *Plananscheck*, 200 Wisc. 304, 71 A. L. R. 331).

11. They have, however, been codified by Convention rather than by legislation for the very purpose of further establishing uniformity than could be done by attempting a degree of uniformity by legislation. This is the fundamental and significant distinction between respectively "Recommendations" and "Conventions" under the *Consti-*

tution of the International Labour Organization, Art. 19. (Compare *Constitution and By-Laws of the National Conference of Commissioners on Uniform State Laws*, Art. VIII, which provides only for "recommendation").

From 1920 to 1936, there were four special maritime or "Seamen's Conference" sessions, *viz.* the Second, Ninth, Thirteenth and Twenty-first Conferences, in respectively 1920, 1926, 1929 and 1936. At the Second Conference, 1920, Agenda Item IV was "The Possibility of Establishing an International Code for Seamen." The Conference adopted (See *Record of Proceedings, International Labour Conference*, 2d. Sess., p. 173) a Resolution (*Id.*, p. 594) requesting the International Labour Office to make investigations necessary for establishing an international seamen's code (See also Commission report, Appendix V, *Id.*, pp. 547-566, and debate, *Id.*, pp. 162-183; *Report IV, Seamen's Conference, International Labour Office*, June, 1920, pp. 62, 155, 159).

In 1921 the International Labour Office published a volume "The International Seamen's Code," discussing the same subjects, pp. 5, 9, 33-37, and urging "codifying and uniformising the law" (*Id.*, p. 36).

Following the Ninth (Second Seamen's) Session of the Conference, the International Labour Office in 1927 published "The International Labour Organization and the Seaman," containing at pp. 10 et seq. a discussion advocating "An International Seamen's Code'," reiterating and amplifying the 1921 views and stating it would be "entirely possible for an international Code to be established."

The 1929 First Discussion report stated that "Thus it would seem that the international regulations might *impose obligations* on shipowners in case of sickness or injury which necessitates medical aid or causes incapacity for work" (*First Discussion report, supra*, p. 209; italics

ours). The 1929 Conference adopted a preamble definitely stating that "the individual liability of the shipowner towards sick or injured seamen could be made the subject of a Draft Convention" (*Record of Proceedings, International Labour Conference, 13th Sess.; supra*, p. 371). This was over the shipowners' protest that a Recommendation would be preferable because a Convention would "override differences in national systems" (*Id.*, p. 377). The Conference rejected the idea that "the development of the shipowner's liability * * * should be left to the free play of forces within national legislation" (*Id.*, p. 131).

From that time forward, it was a matter of working out what liabilities should be positively imposed, and what liberties should be permitted to the separate countries to make unilateral modifications.

When the Convention was under consideration for ratification by our Government, the Secretary of State, by letter to the President dated August 18, 1937, stated that the reason for attainment of its objectives of greater protection for seamen by international agreement was that the failure of any nation to adopt humane conditions "is an obstacle in the way of other nations" and stressed the "competitive" effect (*H. R. Report No. 1328*, 76th Cong. 1st Sess., p. 9).

For greater reasons, therefore, than apply to our Uniform State Laws, these statute-like liability provisions of the Convention "should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the [countries ratifying] it", lest we "miss the desired uniformity and * * * erect upon the foundations of uniform language separate legal structures as distinct as were the former varying laws" (Cf. *Commercial National Bank of New Orleans* v. *Canal-Louisiana Bank & Trust Co., supra*, 239 U. S. 520, 528-529).

12. Because made primarily for the protection and benefit of seamen, they are to be liberally construed to carry out such purposes (*Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 248; *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783; *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 431; *Warner* v. *Goltra*, 293 U. S. 155, 156, 162; *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 375; *Jamison* v. *Encarnacion*, 281 U. S. 635, 640). Moreover, as treaty provisions they are to be liberally construed to accomplish its full purposes (*Baccardi Corp.* v. *Domeneck*, 311 U. S. 150, 163; *Asakura* v. *Seattle*, 265 U. S. 332, 342; *Hauenstein* v. *Lynham*, 100 U. S. 483, 487).

13. As noted in the Petition, and supporting Brief, the Secretary of State very aptly pointed out that, as to these statute-like liability provisions, "there would appear to be no need to repeat verbatim the language of the Convention in a statute to make it effective" (*H. R. Report, 1328*; 76th Congress 1st Sess., p. 6). Manifestly, as to the liability provisions, in contrast to the contractual provisions respecting permitted exceptions, all that a statute could do without violation of the Convention would be to "repeat verbatim" the Convention langauge. This would be like repeating verbatim another Act of Congress, since both equally are "supreme law of the land" (United States Constitution, Art. VI, Cl. 2).

POINT II

By contrast, the provisions permitting exceptions are contractual in nature, and establish no exceptions in absence of national legislation to "make exceptions."

14. For the very reason that the liability provisions are positive, other provisions were inserted to permit limited national modifications, without entailing violation of the Convention.

Such are the permissive provisions that national laws or regulations "may make exceptions" (Art. 1, Cl. 2; Art. 2, Cl. 2); "may provide" for nonliability for concealed sickness (Art. 2, Cl. 3); "may limit" liability to minimum periods (Art. 4, Cl. 2; Art. 5, Cl. 2); "may provide" for liability to "cease" in cases of available insurance or workmen's compensation schemes (Art. 4, Cl. 3(a), and (b); Art. 5, Cl. 3(a) and (b)); "may provide" for insurance reimbursement of burial expense (Art. 7, Cl. 2); the provision that the shipowner "may be exempted" from liability under Articles 4, 6 and 7, insofar as such liability is assumed by the public authorities (Art. 10); and the provisions that any member "may denounce" the Convention after any ten year interval (Art. 17).

15. In contrast to the statute-like liability provisions, these permissive provisions use "the language of contract" (*Foster and Elam* v. *Neilson*, 2 Pet. [27 U. S.] 253, 314-315).

The word "may" is common to them all, in contrast to the words "shall be liable" used in the liability provisions.

But "may" is a word of permission, consent or authorization (*Terre Haute & Indianapolis R. R. Co.* v. *Indiana*, 194 U. S. 579, 587, 588; *Farmers & Merchants Bank* v. *Federal Reserve Bank*, 262 U. S. 649, 662-663; *Interstate Com-*

merce Commission v. *Inland Waterways Corp.*, 319 U. S. 671, 689; *Anderson* v. *Yungkau*, 329 U. S. 482, 485; *United States ex rel. Siegel* v. *Thoman*, 156 U. S. 353, 360; *Thompson* v. *Lessee of Carroll*, 22 How [63 U. S.] 422, 434; *Levers* v. *Anderson*, 326 U. S. 219, 223; *The Mary N. Hogan*, D. C. S. D. N. Y., Brown, *J.*, 17 Fed. 813, 814).

In the *Terre Haute* case a statutory charter provided that the legislature "may so regulate the tolls and freights" that not exceeding 15% be divided on capital, with any surplus payable to the State. Reversing a judgment for the State, this Court, by Holmes, *J.*, said "The language is plain" and operated to "leave the rights of the State in abeyance until a future legislature should choose to act" (194 U. S. 587). It pointed out that, after the charter was enacted "Circumstances might change, and knowledge might change" (194 U. S. 588), and the provision simply made the charter "subject to the power of the State in certain events to require it to pay over extra profits" (194 U. S. 589).

16. Apparently the provisions permitting that national laws or regulations "may provide" for dove-tailing the Convention liabilities with insurance or workman's compensation schemes of any "territory" of registry were primarily in the seaman's interest. See Committee Chairman Grieser's statement, "he may be covered by a system of sickness insurance and the benefits which may be granted by an insurance system exceed those which could be granted by the individual liability of the shipowner" (*Record, International Labour Conference*, 13th Sess., 1929, p. 131). The system itself, however, might be applicable in terms only after care and maintenance liability ceased. (Cf. *Anchor Line [Henderson Brothers] Ltd.* v. *Mohad*, L. R. [1922], 1 A. C. 146, 153, 155, 157; *English Workmen's Compensation Act, 1906*, c. 58, §7(e), L. R. 6 & 7

Edw. 325, 331). Hence, the proviso that *national* laws or regulations "may provide" the "cease" element required by any such "territory" scheme, rather than have the seaman do so by deserting, as did *Mohad*.

Note that an amendment which would have provided for a country, having sickness insurance and workmen's compensation, with shipowner's liability until repatriation, "to be deemed to comply with the requirements" of this Article was rejected (*Record, International Labour Conference*, 21st & 22nd Sess., 1936, pp. 252-253). "The general rule was laid down in paragraph 1, while paragraphs 2 and 3 provided for the *possibility* of alternative limitations in certain cases" (*Id.*, p. 251). "The first paragraph *made* the duration of liability depend on the seaman's condition; the second paragraph *permitted* a time limit of 16 weeks to be applied, and the third paragraph *permitted* termination of liability where benefits were provided for under a system of sickness insurance, accident insurance or workmen's compensation" (*Id.*, p. 252). "Meanwhile it was necessary to procure a *certain* measure of protection" (*Id.*, p. 253; italics ours).

17. By the "may limit" the period of liability provisions the Convention—after fixing duration of assistance by duration of treatment necessitated for cure; a principle "indisputable from the social standpoint"—merely "*leaves it open* to national laws or regulations to fix the period on the expiry of which the liability of the shipowner shall cease" (*Second Discussion—Report II*, International Labour Office, 1931, p. 162) after a period "not less than" stated in the permitting proviso (*Id.*, p. 163) Note also, "it should be *left to national legislation*, however, to provide" for termination of wages at expiry of a minimum period (*Id.*, pp. 142-143); "*leaving it open* to national laws or regulations" to fix such period of expiry (*Id.*, pp. 164-

165). The 1929 *First Discussion* report had suggested "a provision *leaving the national laws the power*" to fix such a period (*First Discussion* report, *International Labour Office*, 1929, p. 217). Cf. also pp. 226, 227, 236, speaking of allowing national laws the "faculty" of making certain exceptions under companion Convention. (Italics ours.)

18. How plainly executory and permissive are the optional modifications allowed under Article 2, and the importance of this, are shown by its discussion (as then numbered Article 3) at the 1936 Conference (*Record, International Labour Conference*, 21st & 22nd Sess., 1936, pp. 249-251). An amendment to add paragraph 3 would have had it read that "The liability of the shipowner shall not apply" where medical examination had been refused. On first vote, the amendment was adopted 22-21; a one vote margin. It was immediately reconsidered, referred to a subcommittee, revised to read that "*National Laws or regulations may provide that* the liability of the shipowner shall not apply," etc.; and then was adopted 37-0 (*Id.*, pp. 250-251; italics ours).

In Paragraph 2(a) "The office text *authorized* Members *to make* an exception in respect of: (a) injury incurred otherwise than in the service of the ship." An amendment to add "sickness," so as "*to enable* national laws to apply restrictions in case of sickness" equally with injury, was rejected. The effect of paragraph 2(b) was that "*Members were authorized to make* exceptions in respect of" injury or sickness due to wilful misconduct or sickness intentionally concealed (*Id.*, p. 250).

They were reported to the Conference as "a list of exemptions which *may be made* by national laws and which are specified in the draft" (*Id.*, p. 73) (Italics ours). The *Second Discussion—Report II* had proposed that "the Draft Convention should *permit* national laws to provide

an exception" (*Second Discussion—Report II, International Labour Office, 1931*, p. 117) and "allow national laws to provide an exception" in specified cases (*Id.*, p. 128), stating that "It is with some regret" than the Office included the clause that "National Laws or regulations may make an exception in respect of injury incurred otherwise than in the service of the ship" (*Id.*, p. 164).

At one point, the conclusions hypothesized "*Even if national law were to make use of all* the *possible* exceptions" (*Id.*, p. 160).

19. It has been said that "Making involves causality—the production of an effect by a cause * * * And the causing * * * involves the idea that it is without previous existence" (*In re I. Rheinstrom & Sons Co.*, D. C. E. D. Ky., Cochran, D. J. 207 Fed. 119, 151, 152, affd. CCA 6, 221 Fed. 829, app. dismissed 239 U. S. 11). Particularly is this true when what one is to "make" are "exceptions" by or pursuant to a proviso or other separated clause. The use here of the word "exceptions" negatives the idea of a savings clause saving pre-Convention defenses (which, moreover, were not formulated with reference to the Convention liabilities); for it necessarily has post reference to the treaty made liabilities. Otherwise "some other word than 'exception' would have been used" (Cf. *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 549).

Exceptions by or pursuant to provisos involve the principle of the carving knife; provisos either do or do not effectively "carve" some particular "special exceptions only out of the body" of the principal clause (*United States* v. *Dickson*, 15 Pet. [40 U. S.] 141, 165; *Ruan* v. *Carter*, 93 U. S. 78, 83, 84; *Columbia Insurance Co.* v. *Lawrence*, 10 Pet. [35 U. S.] 507, 518; See also *Schlemmer* v. *Buffalo Rochester & Pittsburgh Ry. Co.*, 205 U. S. 1, 10; *Javierre* v. *Central Altagracia*, 217 U. S. 502, 507-508;

McKelvey v. *United States*, 260 U. S. 353, 356-357; *Interstate Commerce Comm.* v. *Baird*, 194 U. S. 25, 36, 37; *Moore-Ice Cream Co.* v. *Rose*, 289 U. S. 373, 377).

20. Here, the Convention in the provisos has used, not the carving knife, but the surveyor's pencil. It has merely marked out bounds within which Members "may", at their national option, "make exceptions."

Even these are left to definition or further limitation, within the limited field marked out, as shown by the words "in respect of." In *American Chicle Co.* v. *United States*, 316 U. S. 450, 453, this Court treated the statutory phrase "with respect to" as meaning "as relates to." The proviso in Art. 2, Cl. 2 thus allows an option to "make" one or more exceptions under (a) relating to injury occurring "otherwise than in the service of the ship," and under (b) relating to injury due to wilful act, default or misbehaviour. It may by national law "except" from the liability provisions some while not excepting others of either or both classes, or may "except" all, or may omit to "except" any.

How unwise it might prove for Congress to "make" broadly an exception, in the language of (a) appears by comparing, the "deceptively simple and litigiously prolific" (Cf. *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469, 479) term "arising out of and in the course of employment" used in compensation laws.

To omit to make any exceptions would be in keeping both with the spirit in which the Convention was adopted, and with the policy which motivated our Government in ratifying it. But most significant here is the fact that Congress has omitted to make any exceptions.

21. Where there is "a condition subsequent embodied in a proviso", precisely that condition must be shown to have occurred, and it is "not enough" even to show that

something "called by the same name" exists (*Holmes, J.*, in *Javierre* v. *Central Altagracia*, *supra*, 217 U. S. at 507-508). Here the proviso is that "National laws or regulations may make exceptions in respect of." The majority below in reasoning that "decisional law" can be called by the same name "national laws or regulations", loses sight of the remaining words "may make exceptions in respect of". (Cf. *Terre Haute & Indianapolis R. R. Co.* v. *Indiana*, *supra*, 194 U. S. 579, 587, 588).

It overlooks also that in Art. 2 Cl. 2 and every other instance where the English text uses the term, "national laws or regulations" the French text uses the term "législation nationale," whereas in the three instances where the English word "law" is used with reference to possibly existing law (Art. 4, Cl. 3(b); Art. 5, Cl. 3(b) and Art. 12) the French text uses "loi" (Cf. *United States* v. *Percheman*, 7 Pet. [32 U. S.] 51, 88-89, where, with the Spanish Text before it, the Court gave an oppositive interpretation to the same treaty interpreted from the English text alone in *Foster & Elam* v. *Nielson*, 2 Pet. [27 U. S.] 253, 314-315).

22. This Court has frequently held that the making of exceptions, additional exceptions, or qualifications to a law is a legislative function, and the Courts can not make nor add to them (*Maxwell* v. *Moore*, 22 How. [63 U. S.] 185, 191; *French* v. *Spencer*, 21 How [62 U. S.] 228, 238; *Yturbide* v. *United States*, 22 How. [63 U. S.] 290, 293; *Galloway* v. *Finley*, 12 Pet. [37 U. S.] 264, 299; *Leffingwell* v. *Warren*, 2 Bl. [67 U. S.] 599, 605; *Louisville* v. *Nashville R. R. Co.* v. *Motley*, 219 U. S. 467, 479; *Bank* v. *Sherman*, 101 U. S. 403, 406; *DeLima* v. *Bidwell*, 182 U. S. 1, 198; *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438, 451-452; *Sturges* v. *Crowinshield*, 4 Wheat. [17 U. S.] 122, 202-203). The Courts may not accomplish a different

meaning "by inverting the ordinary meaning of words" (*DeLima* v. *Bidwell, supra,* 182 U. S. p. 198).

23. The majority decision below would completely invert the arrangement and the language of the Convention, with paradoxical results.

If by "decisional law" the majority below mean pre-Convention decisions such as *Peterson* v. *The Chandos* (1880), D. C. Or., 6 Sawy. 544, 4 Fed. 645; *The J. F. Card* (1890), D. C. Mich., 43 Fed. 92; and *The Ben Flint* (1867), D. C. Wisc. 1 Abb (U. S.) 126, 1 Biss 562, 3 Fed. Cas. No. 1299, cited in the Courts first opinion (179 F. 2d. 921), we have the paradox of Courts making exceptions to a treaty over fifty years prior to its existence, and, of course, without considering its provisions. On the one hand, Courts cannot decide matters not before them; on the other hand, "exceptions" cannot be made to an instrument or clause before the instrument or clause itself exist.

If by "decisional law" the majority mean its current decision, we have the paradox of one of the ten Courts of Appeals—itself limited by the Constitution to the "judicial power" and the "case" before it (U. S. Constitution, Art. III, §2)—making on March 2, 1950, "exceptions" pursuant to national option under a treaty in effect since 1939, which heretofore had no judicial "exception" appended (*Smith* v. *United States,* CCA 4, 167 F. 2d 550, 552), and to which Congress deliberately omitted to "make exceptions". (Cf. *The Amiable Isabella,* 6 Wheat. [19 U. S.] 1, 73; *Muskrat* v. *United States,* 219 U. S. 346, 356, 361; *United States* v. *Ferreira,* 13 How. [54 U. S.] 40, 48-49).

In either case, one might as well say that pre-Convention Courts or Courts today may exercise the national authority to terminate the treaty under Article 17, as to say that such Courts "may make exceptions" permitted to the national policy.

24. Instead of the liability provisions being positive *sans* defenses, until a Member elect by legislation to "make exceptions," the *defenses* would be rendered positive *sans* equivalent liability until a member elect by legislation to *un*make exceptions and create liabilities.

Instead of all governments and shipowners being bound initially by uniform liability provisions *sans* exceptions, enabling each government from this vantage point to formulate its policy of whether to proceed alone in making exceptions—with due regard to the policy of others and the considered effect on them of its making or not making the exceptions permitted; this highly valuable uniform position would be destroyed and the competitive situation would be reverted to precisely what it was before the Convention.

If the legislative branch of this or any other Government should then think—as did the treaty-makers and Congress—that the benefits should be *sans* exceptions, it could not accomplish this by merely omitting to make exceptions but would act alone in providing increased benefits, with no similar effect of its action on the policy of others (Cf. Secretary Hull's statement of "The reason" for the Convention, *H. R. Report No. 1328*, 76th Cong., 1st Sess., p. 9; speeches of Chairman Fontaine, *Record International Labour Conference*, 13th Sess., 1929, p. 4; Grieser, *Id.*, p. 131; Hohman, *Record of International Labour Conf.* 21st and 22nd Sess., 1936, pp. 72-73).

The majority decision below would completely deprive Congress and the Government of the option to omit to "make exceptions." This tremendous reversal of national and international policy would be accomplished by judicial fiat of a single court of a single treaty adherent, destroying rather than applying the text of the Convention.

25. As noted in the Petition and supporting Brief the Secretary of State and other department heads, Commissions, and Boards repeatedly interpreted these provisions as merely permissive, so that "If this Government is to be excepted from certain obligations of the Convention or alterations in our present practice, it is necessary to do so affirmatively by statute" (*H. R. Report 1328, supra*, p. 6, *et seq.*).

This point was specifically made also by the Committee Chairman in House Hearings on H. R. 6881 (*Hearings, Committee on Merchant Marine and Fisheries, House of Representatives*, 76th Congress, 1st Sess. on H. R. 6726 and H. R. 6881, at p. 46); and by Senators White and Overton in Senate Committee hearings (*Hearings, Subcommittee of the Committee on Commerce*, United States Senate, 76th Cong. 3rd Sess. on H. R. 6881, at pp. 189, 303). It was applied in drafting H. R. 6881, which was passed by the House, but which died in the Senate when a Title II was added by the Senator who introduced it, to make seamen subject to Workmen's Compensation somewhat as had companion H. R. 6726, which the House Committee had dropped during the hearings (see the two Committee hearings, *supra*).

The point was specifically recognized by the President's Proclamation of the Convention "subject * * * to any exceptions and any limitations of liability in accordance with the provisions of the convention which may be made by legislation or regulations on the part of the United States of America" (54 Stat. 1704).

Under Article I of the companion *Officers Competency Certificates Convention*, similarly permitting exceptions as to vessels, the point was recognized and given application by Congress and the President in the enactment of the *Act of March 29th, 1939*, c. 26, 52 Stat. 554, now 46

U. S. C. §241, making by statute exceptions to such companion Convention, and the Presidential Proclamation of that Convention subject to those statutory exceptions (54 Stat. 1683, 1692). Reporting on the bill (H. R. 950) before its enactment, the House Committee, pointing out that the Convention was effective for 10 years, and then "If not denounced," it would be binding for 10 years more, said "This makes it important that exception be granted forthwith to all vessels which according to the terms of the treaty or convention may be exempted, and your Committee believes this should be an accomplished fact before October 29, 1939, when the Convention goes into effect * * * These vessels unless exempted as proposed in this bill would include vessels of 5 tons and over" (*H. R. Report No. 41, 76th Cong. 1st Sess.* p. 3). This report preceded *Report No. 1328* by the same Committee.

Compare also Arts. 1 of the two Conventions: Whereas the Liability Convention Art. 1, Cl. 1, by the words "other than a ship of war," excepts only ships of war, the Officers Competency Convention Art. 1, Cl. 1 itself excepted (a) ships of war, (b) government or public vessels and (c) wooden dhows and junks; Clause 2 in both cases providing that "National laws or regulations may" make further limited exceptions (54 Stat. 1684, 1694). Re materiality see V Hackworth's Digest of International Law, p. 229, citing World Court decision.

Congressional omission to make any exceptions under the Liability Convention indicates a national policy not to make exceptions; and the Court may not properly deprive Congress of this option.

26. The simple interpretation made by the President; by the Secretary of State and eight other heads of Departments, Commissions and Boards; by Chief Justice Stone in *Waterman Steamship Corp.* v. *Jones*, 318 U. S., 724, 738;

by the Fourth Circuit Court of Appeals in *Smith* v. *United States*, 167 F. 2d. 550, 552, and by dissenting Judge Frank herein (179 F. 2d. 923-924)—fully supported, we submit, by this Court's decisions in *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 42 and *Farrell* v. *United States*, 336 U. S. 511, 517—is simply the plain meaning of the Convention's language, which those distinguished officials and jurists recognized needed no massing of "reasons" (*Swan, C.J.*, 179 F. 2d. 923) to support it. It is, nevertheless, supported by every step taken since inception in 1920 of the program for a "Seaman's Code" by Convention, until the decision of the majority below. That decision, unless reversed, and not the Convention, would "*create*" (Cf. *Hamilton* v. *Rathbone*, 175 U. S. 414, 419, 421) paradox and confusion, and thereby destroy this and other Conventions similarly worded.

POINT III

Even if the provisions permitting exceptions themselves established the exceptions, the clause relied on would not allow negligence as a defense, but would require that "wilful" misconduct be shown.

So also would the general maritime law, if the convention could be held wholly inoperative.

27. The *Second Discussion-Report II*, prepared after governments replied to the *Questionnaire* and submitted suggestions, states that "these various suggestions . . . appear to have one idea in common that has attracted the attention of nearly all Governments, and that is the idea of wilfulness. It is this factor of wilfulness that plays a decisive part in the definitions of inexcusable fault, serious fault, grave negligence, etc." (*Second Discussion—Report II, International Labour Office 1931, supra*, p. 128). "Owing

to the variety of definitions proposed, the formulation of the international text has been rather difficult. On the whole, it seems possible to obtain general support for the expression 'wilful misconduct,' because this is an average solution which moreover comprises the factor common to most of the expressions considered, i.e., that of wilfulness" (*Id.*, pp. 161-162).

When the proposed clause was being considered by Committee at the 1936 Conference, one amendment proposed to substitute for "wilful misconduct" the words "act, default or misbehaviour"; another proposed to insert after the words "wilful misconduct" the words "or gross negligence." It was argued "that the shipowner ought not to be held liable for the consequences of the act or even for the negligence of the seaman. A Government member observed that he would be prepared to support the *first* of these amendments *if the word 'wilful' were maintained.*" The first amendment was altered to substitute "wilful act, default or misbehaviour" and adopted; the second was rejected (*Record of Proceedings, International Labour Conference, 21st & 22nd Sess., supra,* p. 250; italics ours). Compare French text of Art. 2, Cl. 2(b) (54 Stat. 1695).

The Court below erred, therefore, in holding petitioner barred, even if the clause were self-executing and if, as it said "the care which Warren took was very slight" and represented "gross negligence" (179 F. 2d. 922). Actually, he was intent upon viewing a beautiful scene, and was guilty at most of momentary lack of considered carefulness.

28. But wilfulness would be required under the general maritime law, even if the Convention were wholly inapplicable. The *Second Discussion—Report II*, as noted above, shows almost unanimity of the maritime world in requiring "wilfulness" under their pre-Convention maritime laws, whatever the term used in naming the defense. As

to our pre-Convention general maritime law decisions, and the errors below in their interpretation, reference is made to the Petition (pp. 11-15) and supporting Brief (pp. 25-35).

If the statutory rule under the Vermont automobile guest statute involved in *Moisan* v. *Loftus*, C. C. A. 2, 178 F. 2d. 148, cited below (179 N. 2d. 921), could be applied in the Second Circuit, then with equal authority the opposite rule under comparable automobile guest statutes of other States could be applied in other Circuits; and other States hold that "gross negligence" is a misnomer which, however, in such statutes means "wilful and wanton misconduct" (*Bashie* v. *Johnson*, 296 Mich. 8; *Keehn* v. *Braubach*, 307 Ill. App. 339; *Melby* v. *Anderson*, 64 S. D. 249; *Anderson* v. *Anderson*, 69 N. D. 229; *Orme* v. *Burr*, 157 Fla. 378; *Witdock* v. *Gyselbracht*, 67 Oh. App. 120; *Bruno* v. *Donahue*, 305 Mass. 30; *New Amsterdam Casualty Co.* v. *Jones*, C. C. A. 6, 135 F. 2d. 191; *Krueger* v. *Taylor*, C. A. D. C. 132 F. 2d. 732).

The term in Maritime decisions, however, is not the statutory term of any State. It was borrowed below from old District Court decisions allowing recoveries to injured seamen in which it clearly was used as synonymous or interchangeable with "positively vicious conduct" (*Peterson* v. *The Chaudos*, 6 Sawy. 544, 4 Fed. 645; *The City of Carlisle*, 39 Fed. 807, 813); "vicious or unjustifiable conduct * * * operating in the nature of a fraud upon the owners" (*The Ben Flint*, 1 Abb. (U. S.) 126, 1 Biss 562, 3 Fed. Cas. No. 1299). Not these old decisions, but the Court below introduced the Vermont automobile guest statute concept. As pointed out in our Brief supporting the Petition, the only differences between the *Peterson* case and the case at bar are (1) that Peterson was at work, whereas Warren was on shore leave, and (2) Peterson was more negligent than Warren. *Aguilar* v. *Standard Oil Company*, 318 U. S.

724 removed (1) as a ground for distinction; moreover, the Convention and the learning embodied in the International Labour Office reports which influenced its adoption, confirms such as the proper holding under *general* maritime law, even were the Convention itself not "supreme law of the land." And (2) favors Petitioner.

We repeat, as in our prior Brief (p. 33), that *Peterson* v. *The Chaudos* and the decision below cannot both be right. Indeed, claim adjusters already insist that this *Warren* decision below destroys such precedents as *Peterson*, overrules *Aguilar* and renders the Convention a new burden rather than boon to seamen.

As pointed out in the Petition (p. 14, par. 19) and supporting Brief (p. 29, par. 5), this Court has never held that "negligence," nor the epithetic "gross negligence," is a bar to maintenance and cure. It should not do so now.

POINT IV

The error in holding that recovery would make the shipowner an insurer of the seaman's safety. The importance of clarifying this.

As pointed out in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 93-97, even the shipowner's liability for unseaworthiness is one imposed "regardless of his fault," because "he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear the cost" (p. 94; see also p. 96); "Not the owner's consent to liability, but his consent to performance of the service defines its boundary" (p. 96); "the liability arises as an incident, not merely of the seaman's contract, but of performing the ship's service with the owner's consent" (p. 97), as "the traditional securities afforded by the law of the sea to men who do the ship's work" (p. 100). The

dissent by two Justices specifically stated that the decision established that "the owner is an insurer against injury caused by unseaworthiness" (p. 103) and represented "paid up accident insurance policies" (p. 107); and the dissent was mainly upon the ground, not that these rulings were wrong as to seamen, but that they were inapplicable to stevedores or longshoremen, saying: "The whole philosophy of liability without fault is that losses which are incidental to socially desirable conduct should be placed on those best able to bear them" (p. 108).

While liability for unseaworthiness involves damages, the maintenance and cure liability always has been one for maintenance of the sick and injured man and treatment to effect a cure.

A stock argument of shipowners' counsel in cases involving the liability, nevertheless, is that to allow recovery would make them insurers. It consistently has been shipowners' language rather than that of the seaman, who knows little of wordy distinctions. But, despite the fact that it means, in effect, that "To hold us liable would make us liable," it has been astonishingly successful in defeating recoveries before lower courts, as witness the decision below, and the District Court decision in *The Robert Jordan*, *Smith* v. *United States*, D. C. E. D. Va., 74 F. Supp. 275, 277, revd. *Smith* v. *United States*, C. C. A. 4, 167 F. 2d. 550, 552.

The Convention was designed to "ensure" more favorable conditions (Art. 12); and it seeks to promote "rapid and inexpensive settlement of disputes" (Art. 9). We submit that the Court should remove the dangers of this ever recurring shipowner shibboleth by frankly confirming that the liability, indeed, is one representing for practical purposes insurance, and that the cry that it constitutes insurance should no longer be accepted below to defeat recoveries

but applied to sustain them, as the traditional principles of maintenance and cure decisions and the clear policy of the Convention require.

CONCLUSION

The judgment below should be reversed and the case remanded with directions to enter judgment for petitioner for $644.16 maintenance and cure and costs and disbursements in all courts.

Respectfully submitted,

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